77-989

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1977

DENNIS WOLF,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, SECOND DISTRICT STATE OF ILLINOIS

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The Petitioner, DENNIS WOLF, prays that a Writ Of Certiorari issue to review the opinion and judgment of the Appellate Court, Second District, State of Illinois rendered in the proceedings on May 12, 1977. Rehearing denied June 17, 1977.

OPINIONS BELOW

The opinion of the Appellate Court, Second District, State of Illinois, is reported at 48 Ill. App. 3d 736, 363 N.E. 2d 402, appears at Appendix A, infra, pp. 1a-9a. The order of the Illinois Supreme Court denying Petition for Leave to Appeal, is unreported. However, the transmittal letter from the Clerk of the Illinois Supreme Court appears at Appendix B, infra, p. 10a.

JURISDICTION

The judgment was entered by the Eighteenth Judicial Circuit, State of Illinois, on April 27, 1976 after it denied Petitioner's Motion For New Trial on April 2, 1976. The Appellate Court, Second District, State of Illinois, affirmed the Circuit Court in its opinion filed May 12, 1977 after denying Petitioner's Petition For Rehearing on June 16, 1977. See Appendix A, pp. 1a-9a *infra.* Petition For Leave to Appeal to the Supreme Court of Illinois was denied on September 30, 1977. However, no order from the Supreme Court of Illinois was received. The notification received by the Petitioner was a letter of transmittal received by Petitioner's counsel on October 10, 1977. See Appendix B, pp. 10a. This Petition For Certiorari was filed less than 90 days from October 10, 1977. The jurisdiction of this Court is involved under 28 USC Sections 1257 (3).

QUESTIONS PRESENTED

The People of the State of Illinois tried and convicted Petitioner for the criminal offense of armed robbery. The issues arising from said trial are as follows:

1. Whether the Appellate Court, Second District State of Illinois erred in affirming the trial court in holding that the identification of Petitioner was not impermissably suggestive and unreliable and as such was not inconsistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. Whether the Appellate Court, Second District, State of Illinois, erred in affirming the trial courts denial of a new trial on the basis of newly discovered evidence, when it based its decision on the fact that it believed that Petitioner's family had not exercised due diligence in discover-

ing Petitioner's alibi and found that the denial of a new trial was not inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF FACTS

The facts relevant to the questions presented by this Petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

Petitioner was convicted of armed robbery after a trial by jury in the Eighteenth Judicial Circuit, State of Illinois. Petitioner was sixteen years of age when the alleged offense occurred, juvenile court hearings subsequently authorized his prosecution as an adult. Petitioner Wolf was sentenced to not less than four or more than six years in the state penetentiary.

On the night of July 31, 1974, Larry Capps, an attendant at the Go-tane Gas Station in Lombard, noticed two men walking on Roosevelt Road approximately forty feet from him in an area illuminated by street lights. Shortly thereafter the same two men entered the gas station office, produced a gun and demanded money. Two men took $170.00 and told Capps to lie on the floor and left the station. When the police arrived Capps described one man as blond, blue eyed, 5'10" tall, 170 pounds 19-20 years old. The second man he described as dark haired, six feet tall, 170-185 pounds and 19-20 years old. He

also described the clothing of the two people. Later that evening, assisted by a deputy of the DuPage County Sheriff's Department, Capps built a composite likeness of each of the men using an identikit.

Subsequent to a finding of guilty, Petitioner filed a timely post trial motion for a new trial based upon newly discovered evidence. Said Motion contained the affidavits of Susan Werler, Marie Wolf, Dorothy Werler and Dennis Wolf and all affidavits asserted that Petitioner had been at his residence between 8:00 p.m. and 10:00 p.m. and subsequent to 10:00 p.m. was with Susan Werler until 11:30 p.m. Subsequent to the filing of said Motion the above referred to parties testified at a hearing on the Motion held on April of 1976 that Petitioner attended a birthday celebration for this aunt in his own home on July 31, 1974, then accompanied several persons to the home of a cousin at about the time of the robbery.

The trial court found that the Petitioner failed to show that the newly discovered evidence as to his whereabouts on the date of the alleged occurrence could not have been discovered had he exercised sufficient diligence and his family had also exercised sufficient diligence in discovering same.

REASONS FOR GRANTING THE WRIT

While this case is important to the Petitioner in that Dennis Wolf will have to serve a term in the Illinois prisons as well as a probation term if said Writ is not granted, yet there is a matter hereinvolved which is far more important. The protection of juveniles tried as adults is involved.

It is the Petitioner's contention that this Court should review the standard for admission for newly discovered evidence in cases regarding juveniles tried as adults in light of the due process clause of the Fourteenth Amendment of the United States Constitution. It was well settled that many factors may influence a child that do not influence an adult and as such where a child is involved, a Court should use special care in scrutinizing the records to ascertain if some influence did not overcome his rational thought processes or his will.

In its review of the factors militating against the Petitioner the Appellate Court, Second District, State of Illinois in its affirmation of the trial court's denial of Petitioner's Motion For New Trial, thoroughly felt that all the prerequisites for the admission of newly discovered evidence had been met by Petitioner except for his failure to use sufficient diligence to uncover the evidence relating to his alibi defense. The Appellate Court, Second District, State of Illinois, stated at Page Six of its Opinion, Appendix A Page 7a, infra. . . . . "the trial court found that Defendant Wolf had failed to show that the newly discovered evidence could not have been induced had he exercised sufficient diligence." Petitioner contends that the following, considered in the totality of the circumstances exhibited sufficient diligence on this juvenile criminal defendant's part:

1. Sufficient diligence is relative to the factual situation of each case. The degree of care and diligence which circumstances reasonably impose depends upon the factual circumstances, which in the case of a juvenile criminal defendant should take the factors of the juvenile's age and participation and competency of parents, mental capacity and overall family situation into consideration.

2. Petitioner was at all relevant times prior to trial only sixteen years of age.

3. That Petitioner was below average in educational ability.

4. That although the Petitioner was before the trial court a number of times, he was not indicted until approximately nine months subsequent to the alleged incident.

5. That during the time between the alleged incident, the indictment herein and the trial of this cause, Petitioner's father was intermittently hospitalized and was dying of terminal cancer; and at the time of trial the juvenile defendant Petitioner herein was without the assistance of his father.

Due process under the Fourteenth Amendment of the United States Constitution demands that if sufficient diligence is placed upon a criminal defendant in discovering newly discovered evidence, i.e., an alibi defense, such sufficient diligence should *not* take into consideration the diligence of the Petitioner juvenile's family in discovering said defense.

The Appellate Court, Second District, State of Illinois stated on Page Six of its Opinion ". . . . it was reasonable to believe that Defendant and his family were apprised and had every opportunity to discover the alibi

defense now asserted." The Appellate Court, Second District, State of Illinois incorrectly hinged the issue of this juvenile Petitioner's diligence in discovery of an alibi on a nebulous conglomerate of individuals referred to as the Petitioner's family.

Petitioner herein contends that a juvenile criminal defendant's family should in no way detrimentally effect a juvenile criminal defendant with regard to said Defendant's diligence in discovering new evidence regarding his trial.

CONCLUSION

For the above reasons, the Writ of Certiorari should issue to review the Judgment and Opinion of the Appellate Court, Second District, State of Illinois in its holding that juvenile criminal defendants will be held to a standard of diligence in discovering newly discovered evidence that is directly affected by their families.

Respectfully submitted,

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APPENDIX A

Appellate Court Opinion

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

DENNIS WOLF and DAVID KAMMES,
Defendants-Appellants.

Appeal from the 18th District
Judicial Circuit,
DuPage County, Illinois

Mr. JUSTICE NASH delivered the opinion of the court:

David Kammes and Dennis Wolf were convicted of armed robbery after a joint trial by jury in the Circuit Court of DuPage County. Both men were 16 years of age when the offense occurred and juvenile court hearings were held authorizing their prosecution as adults. Kammes was sentenced to not less than 4 nor more than 8 years in the penitentiary and Wolf received a sentence of not less than 4 nor more than 6 years. Their separate appeals have been consolidated for consideration and opinion.

On the night of July 31, 1974, Larry Capps, an attendant at the Go-Tane gas station in Lombard, noticed two men walking on Roosevelt Road approximately 40 feet from him in an area illuminated by street lights. Shortly thereafter, the same two men entered the gas station office, produced a gun and demanded money. The office was well-lighted by two rows of fluorescent lights and the men were within five feet of Capps for several minutes. They took $170, told Capps to lie on the floor and left the sta-

tion. When the police arrived Capps described one man as blond, blue eyed, 5′ 10″ tall, 170 pounds and 19 to 20 years old. The second man he described as dark haired, 6 feet tall, 170 to 185 pounds and 19 to 20 years old. He also described their clothing in detail. Later that evening Capps assisted Detective McKechnie of the DuPage County Sheriff's Department in building a composite likeness of each man using an Identi-Kit.

On September 28, 1974, Capps was shown a group of photographs, including those of the defendants, and identified Kammes as the blond man and Wolf as probably the dark haired man who had robbed him. Capps testified that in January 1975 he saw Wolf in a courthouse coffee shop and that he observed Kammes in a courtroom when he attended a scheduled court appearance. Neither defendant testified at trial; several alibi witnesses testified on behalf of defendant Kammes.

Each defendant contends that the trial court erred in denying their respective motions to suppress the photographic lineup which, they argue, was so impermissibly suggestive as to taint the witness' later in-court identification of the defendants. The group of photographs was shown to Capps approximately two months after the robbery. He testified at a hearing on a motion to suppress identification that he was shown three or four photographs; at trial he recalled the number as seven. Detective McKechnie testified at each hearing that he showed Capps nine photographs, four of which he had received from the Elmhurst Police Department including pictures of Kammes, Wolf, and another co-defendant, Tim Keniski, who was tried separately. The other five pictures he chose from the files of the DuPage County Sheriff's Department as generally representing the appearance of defendants.

The DuPage pictures bore dates on the front, ranging from 1967 to 1972. The defendants contend that the dates precluded Capps from choosing those pictures because the men depicted would by 1974 be much older than Capps had estimated the hold-up men to be. Defendants contend also that it was prejudicial to show Capps pictures of men aged 16 to 18 when he had described the robbers as 19 to 20 years old.

The purpose of the hearing on the motion to suppress photographic identification is to determine whether the methods used in presenting the photos to the witness were so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification of a defendant. (*People* v. *Brown* (1972), 52 Ill. 2d 94, 285 N.E.2d 1.) The trial court heard the testimony describing the manner in which the photographs were presented to Capps and observed the photos which were used and found that the lineup was not so suggestive as to taint a later identification of defendants by Capps. It is the burden of a defendant presenting a motion to suppress to show that the photographic lineup was in fact unnecessarily suggestive. Capps testified that he paid no attention to the dates on the pictures; he was looking for a face. There was no evidence that Detective McKechnie indicated to Capps that the pictures of two suspects were included in the photos he was to be shown or that he presented them to Capps in a suggestive manner. The factual situation of each case must be considered in order to determine whether there is evidence that such a showing was impermissibly suggestive. (*People* v. *Irons* (1974), 20 Ill. App. 3d 125, 312 N.E.2d 664). The trial court found the photographic lineup not to have been impermissibly suggestive. We do not disagree. While it is true that photo-

graphic identification may sometimes be unreliable, the procedure is a necessary and effective law enforcement tool which can obviate the needless detention of innocent suspects and assist in the early apprehension of a criminal offender. Its hazards are lessened by the trial process where direct and cross-examination of the witnesses can reveal inaccuracies or inconsistencies which may exist to the trier of fact. (*Simmons* v. *United States* (1968), 390 U.S. 377, 19 L. Ed.2d 1247, 88 S. Ct. 967.) In this instance, Capps was examined extensively on every aspect of his identification of each defendant.

Even if we had found the photographic lineup to have been impermissibly suggestive, there was clear and convincing evidence that the victim, Capps, had an independent basis for his courtroom identification of both defendants which would overcome any prejudice resulting from the photographic lineup conducted in this case. (*People* v. *Carroll* (1973), 12 Ill. App. 3d 869, 299 N.E.2d 134, *cert. denied* (1974), 417 U.S. 972, 41 L. Ed.2d 1144, 94 S. Ct. 3180; *People* v. *Martin* (1970), 47 Ill. 2d 331, 265 N.E.2d 685, *cert. denied* (1971), 403 U.S. 921, 29 L. Ed.2d 700, 91 S. Ct. 2240.) Notwithstanding the gap of 19 months between the robbery and defendants' trial, Capps testified that he observed both defendants at close range in a well-lighted room for several minutes at the time of the robbery; he gave police detailed descriptions of their appearance and clothing. Minor discrepancies between the length of hair on the composites and the actual appearance of defendant Kammes was sufficiently explained by Detective McKechnie who testified that the longer hair styles used with the Identi-Kit were not available on that particular night.

Defendant Kammes contends that the court erred in refusing to allow evidence of the composite process at the

motion to suppress the photographic identification, arguing that had the trial court considered what defendant states are the obvious differences between the composite, prepared by Detective McKechnie and Capps, and himself, the court would have excluded the photographic identification of Kammes as completely unreliable. The purpose of the hearing was not for the judge to decide whether the identification of defendant was correct but to determine the fairness of the identification process employed. Detective McKechnie testified at the hearing that the Elmhurst photos were the product of an independent investigation by the Elmhurst Police Department and that the selection of pictures for the photographic lineup was based on the appearance of the suspects, not on the composite constructed by the victim. In addition, the jury received extensive testimony by both direct and cross-examination with regard to the opportunity of Capps to observe the persons who robbed him, the composite process and the photographic identification. We do not find the trial court's decision to limit testimony on the motion to suppress to have been in error.

Defendant Kammes also contends that the pre-trial "showup" which took place in a courtroom in January 1975 was unnecessarily suggestive thereby denying defendant due process of law. We cannot agree. Apparently the witness, Capps, was in court under subpoena for a hearing in this case when defendant Kammes, dressed in jail coveralls, was brought into the courtroom by a bailiff. There was no evidence that the confrontation was arranged for identification purposes by the officers and no evidence that Detective McKechnie, who accompanied Capps, said anything whatsoever to him. Capps spontaneously identified Kammes as one of the robbers. As earlier shown, Capps also had an independent prior basis for identifica-

tion; no showing has been made that this accidental confrontation in a crowded courtroom was conducive to an irreparable mistaken identification. *People* v. *Covington* (1970), 47 Ill. 2d 198, 265 N.E.2d 112; *People* v. *Jackson* (1974), 23 Ill. App. 3d 1011, 320 N.E.2d 400.

In his separate appeal, defendant Wolf asserts that the trial court erred in denying his post-trial motion for a new trial based upon newly discovered evidence. Several of his relatives testified at the hearing on the motion held in April 1976 that Wolf attended a birthday celebration for his aunt in his own home on July 31, 1974, then accompanied several persons to the home of a cousin at about the time of the robbery. The law in Illinois on this issue is unmistakably clear. As stated in *People* v. *Baker* (1959), 16 Ill. 2d 364, 374, 158 N.E.2d 1, 6:

> "To warrant a new trial, the evidence must be of such conclusive character that it will probably change the result on retrial, that it must be material to the issue but not merely cumulative, and that it must have been discovered since the trial and be of such character that it could not have been discovered prior to trial by the exercise of due diligence."

To prevent the possibilities of fraudulent claims of newly discovered evidence, such motions are looked upon with disfavor by the courts and subjected to the closest inspection. The defendant has the burden of rebutting the presumption that the verdict is correct; the exercise of the trial court's discretion will be disturbed only where the evidence shows a manifest abuse of that discretion. *People* v. *Holtzman* (1953), 1 Ill. 2d 562, 116 N.E.2d 338.

Defendant urges that his age and his family's natural reluctance to discuss the changes pending against him explain his failure to uncover these alibi witnesses at an

earlier date. The cases on which he relies involve the discovery of new eyewitness testimony which would either rebut the State's case or corroborate the defendant's defense. (*People* v. *Hughes* (1973), 11 Ill. App. 3d 224, 296 N.E.2d2d 643; *People* v. *Pirovolos* (1970), 126 Ill. App. 2d 361, 261 N.E.2d 701; *People* v. *Upshaw* (1965), 58 Ill. App. 2d 256, 207 N.E.2d 728.) The proffered testimony here is an alibi. The trial court noted that defendant Kammes had offered an alibi defense which was apparently rejected by the jury in light of the positive identification of that defendant by Mr. Capps. Wolf presented no defense at trial but relied on the cross-examination of Capps to create a reasonable doubt of his guilt. In addition, the trial court found that defendant Wolf had failed to show that the newly discovered evidence could not have been adduced had he exercised sufficient diligence. Wolf had counsel when he learned of the charges against him in early October 1974, approximately nine weeks after the offense. He appeared in court several times in November 1974 when the date of the offense was stated. Wolf testified that it was not until after his conviction that he went back and looked at newspapers to try to refresh his recollection of occurrences of that particular date to attempt to aid his recall of his own activities that day. We believe it reasonable to believe that defendant and his family were apprised of the date well in advance of trial and had every opportunity to discover the alibi defense now asserted. (See *People* v. *Richards* (1970), 120 Ill. App. 2d 313, 256 N.E.2d 475.) No abuse of the trial court's discretion can be found in its denial of defendant Wolf's request for a new trial on these grounds.

Defendant Wolf also contends that a portion of the prosecutor's closing argument was inflammatory and contained an improper reference to his failure to testify

thereby denying him a fair trial. In his argument, defense counsel had attacked the credibility of the State's primary witness, Mr. Capps, by inferring that Capps was only identifying his client because he was part of the "prosecution team" and that the defendants were the "only available people" to pay for the crime. In rebuttal, the prosecutor called that defense "the last refuge of a man who has got nothing else to say, the last refuge of a scoundrel." An immediate objection by defense counsel was sustained by the court and the jury was instructed to disregard the statement. The State argues that this portion of argument was directed at defense counsel in response to defense counsel's attack on Capps. While the remarks were improper, the objection was correctly sustained by the trial court; the general rule is that improper remarks and argument of counsel are not grounds for reversal unless they have caused substantial prejudice to the accused. (*People* v. *Nilsson* (1970), 44 Ill. 2d 244, 255 N.E.2d 432, *cert. denied,* 398 U.S. 954, 26 L. Ed.2d 296, 90 S. Ct. 1881; *People* v. *Phillips* (1970), 126 Ill. App. 2d 179, 261 N.E.2d 469.) No showing of substantial prejudice has been made here.

Defendants each contend that they were not proved guilty beyond a reasonable doubt. The testimony of one witness is sufficient to sustain a conviction so long as that witness had an adequate opportunity to observe the accused. (See, *e.g. People* v. *Brinkley* (1965), 33 Ill. 2d 403, 211 N.E.2d 730). The function of the trier of fact is to determine the credibility of the witnesses and the weight to be given their testimony and its findings will be set aside only where the evidence is so improbable as to justify a reasonable doubt of the defendants' guilt. (*People* v. *McDonald* (1975), 62 Ill. 2d 448, 343 N.E.2d

489; *People* v. *Catlett* (1971), 48 Ill. 2d 56, 268 N.E.2d 378.) The positive identification of defendants by Capps was sufficient to justify the jury's findings in this case.

For the reasons we have stated, the judgment of the trial court is affirmed as to each defendant.

Affirmed.

RECHENMACHER, P.J., and BOYLE, J., concur.

APPENDIX B

State of Illinois
Office of
Clerk Of The Supreme Court
Springfield
62706

September 30, 1977

Mr. Douglas Drenk
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330 Naperville Rd. - Suite 401
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No. 49747 - People State of Illinois, respondent, vs. Dennis Wolf, petitioner. Leave to appeal, Appellate Court, Street District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court